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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM ROBERT BIRDSEYE,
WILLIAM RICHARD BIRDSEYE,
Appellants, Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
Appellee, Respondent,

NOTICE OF APPEAL AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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171 pp

QUESTION PRESENTED FOR REVIEW

Did the Pennsylvania Courts misapply Title 18, United States Code, §2516(2) by permitting the Commonwealth of Pennsylvania to conduct an electronic surveillance of the petitioners' wire communications for crimes not enumerated in that section and which posed no danger to life, limb nor property as required by that section authorizing States to conduct wire interceptions? Does this stretch the federal statute beyond its legislative intent by state statutes which are less restrictive than the federal statute?

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NOTICE OF APPEAL AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The petitioners/appellants William Robert Birdseye and William Richard Birdseye, file this pleading as a notice of appeal and in the alternative as a petition for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Pennsylvania entered in this proceeding on 18 January 1996. The opinion of the Supreme Court of Pennsylvania is not as yet officially reported; however, a copy of that opinion is attached in the appendix below. The opinions of the trial court and the Pennsylvania Superior Court are also attached as is the opinion of the United States Court for the Western District of Pennsylvania which held the wire interception which is the subject of this appeal to have violated the terms of Title 18, United States Code, §2516(2) in a related case that was reversed on procedural grounds by the United States Court of Appeals for the Third Circuit. In ruling that the Pennsylvania Wiretapping and Electronic Surveillance Statute when applied to the Pennsylvania Corrupt Organization Statute overcame the requirement of the federal statute that the offense for which the wire interception was sought must be a danger to life, limb or property by reference to a legislative finding that two incidents of almost any minor crime was a danger to property in Pennsylvania, the

Supreme Court of Pennsylvania interpreted their statute in a fashion repugnant to Title 18, United States Code, §2516(2). Thus, the state statute as interpreted by the highest court in the state is repugnant to a federal statute permitting a direct appeal by the appellants/petitioners.

Thus, out of an abundance of caution, the appellants/petitioners have pleaded alternatively as they wish to appeal, but if this Honorable Court should disagree with appellate jurisdiction they wish this pleading to be considered to be a petition for a Writ of Certiorari.

STATEMENT OF JURISDICTION

From a final order adjudicating the petitioners guilty and sentencing them, the defendants took their appeal by authority of Title 42, Pennsylvania Consolidated Statutes, §742 to the Superior Court of Pennsylvania. The petitioners then petitioned the Supreme Court of Pennsylvania to hear their appeal and review the decisions of the courts below. Its jurisdiction was based upon Title 42, Pennsylvania Consolidated Statutes, §724 which provides jurisdiction for review of all final orders of the Superior Court by allowance of appeal. The Supreme Court of Pennsylvania granted allowance of appeal in this matter as to one issue -- that is whether the Commonwealth's wire interception complied with federal statutes. The Supreme Court of Pennsylvania reviewed the decisions below and affirmed them but on differing grounds and rejecting the decision of the United States Court for the Western District of Pennsylvania which held the wire interception to be illegal in a related tax case which decision was reversed by the United States Court of Appeals for the Third Circuit for unrelated procedural reasons.

From the decision of the Supreme Court of Pennsylvania the petitioners hereby appeal or in the alternative seek review of that

judgment of the highest court of Pennsylvania pursuant to Title 28, United States Code, §1257(3) and an appeal is hereby sought pursuant to Title 28, United States Code, §1257(2)

STATEMENT OF FACTS

Although a somewhat lengthy case, the facts surrounding the alleged criminal activity were rather simple and straightforward, In early 1986 the defendant William Robert Birdseye (Senior) was approached by a Commonwealth informant Gina Rizzo (Source Two) with a proposition that he get into the escort and bachelor party business, something he had never done before. She misrepresented to him that if he did no soliciting himself that he would be committing no crime. Another informant (Source One), suspected to be Marie Romanelle, provided rather indirect and conclusory terms that Senior was using prostitution himself or running a prostitution ring. Using this information, the police placed pen registers (devices to record the numbers called by a telephone) on Senior's telephones. Then combining the phone call information, the information from the two informants, false information from a mental patient, Deborah Piovesan, Senior's former wife, and another informer whose name the police cannot recall (Source Three) and some observations and a large amount of speculation, the Police and District Attorney of Westmoreland County obtained authority to intercept the wire communications of the defendants, Senior's friend Renee Garcia, and

the defendant's employees. At no time was any act of prostitution or solicitation asserted in the affidavit and application for the wire interception nor was any mention made of any danger to life, limb or property set forth pursuant to Title 18, United States Code, §2516(2) as required.

Utilizing the wire interceptions the police purchased magazines, movies and video tapes from the defendants' adult bookstores, seized a recorder and some electronics from one of the stores, searched each store and the defendants' home and seized all the defendants' records, computers, token machines and video games along with much other material.

The records were turned over to the Internal Revenue Service for investigation. The Internal Revenue Service then issued summons for all of the defendants' financial records and sought to have the United States Court for Western District of Pennsylvania enforce the summons through its contempt powers. Judge Mencer ruled that the IRS summons were derived from an illegal interception of wire communications as prostitution, obscenity and corrupt organizations are not among the offenses for which States could obtain authorization to investigate by means of interceptions of wore communications as set forth in Title 18, Unites States Code, §2516(2). See Appendix at pp. A-94 through A-130, reported as *United States v. Millstone*

Enterprises, 684 F. Supp. 867 (WPDA 1988).

In the meantime, the Commonwealth, utilizing an investigative grand jury and over defendants' and the aggrieved witnesses' objections, which the Court of Common Pleas declined to hear, proceeded to interrogate the defendants' employees, dancing girls and alleged patrons about the contents of their telephone calls with the defendants which had been intercepted.

The defendants William Richard Birdseye (Junior) and William Robert Birdseye (Senior) and others were then charged with corrupt organizations (the adult bookstores), obscenity (one video tape and one magazine), prostitution (permitting male prostitutes to use the video booths at the stores), wiretapping and possession of wire intercepting devices used on their own phones, and Senior alone was charged with conspiracy and female prostitution (concerning the bachelor parties). The defendants filed pre-trial motions for discovery, particulars, a severance of counts and defendants, to suppress the interception and searches and for other forms of relief.

The trial court granted defendants' motion to suppress based upon Judge Mencer's decision. The Commonwealth appealed to Superior Court. However, when Judge Mencer's decision was reversed on other (procedural) grounds this Superior Court remanded the case to the trial court for reconsideration of its decision. The trial

court reversed itself and denied the suppression motion. The trial court also denied the defendants' motion for discovery of the identity and whereabouts of the informants (CI 1), (CI 2), and (CI 3) and refused to compel the Commonwealth to specify the acts, dates and locations of the crimes upon which the Commonwealth would rely in proving their case. Defendants' motion for severance was denied as well and the disparate crimes of corrupt organizations, wire tapping, prostitution, possession of wire tapping equipment and obscenity were to go to trial at once (the trial court severed a conspiracy count pursuant to a motion in limine). During the presentation of its case on the motion to suppress, the defense offered testimony that the first informer (CI 1) was Marie Romanelle, who had told defendant Birdseye Senior that she had told neither Trooper Gentile nor Trooper Fielder any of the information contained in the affidavit of probable cause for the interception of wire communications. Although counsel was permitted to question Mrs. Romanelle, he was not permitted to ask her whether or not she told the information in the affidavit to the State Police, the purpose for which she was called.

At trial the Commonwealth, through a series of intercepted telephone calls and witnesses, demonstrated that the defendants indeed ran four adult bookstores in Allegheny, Westmoreland and Bedford Counties. The stores in Bedford and Westmoreland

Counties had dancing booths, and all of the stores had booths in which a patron could view a video tape or a movie in privacy. Each store had token machines which dispensed four tokens for a dollar. The tokens would be used to play the video tape or movie for the patron. Some of the booths had holes in the walls through which the police speculated patrons would engage in sexual conduct, although there was no testimony that such conduct ever took place. At trial only two male prostitutes testified that they engaged in sex with several customers whom they conducted to the Boulevard Book Store in Pittsburgh for which they were paid by the customer. Both acknowledged that they did not reveal the nature of their liaison to the clerk on duty and neither knew nor had any contact with either defendant. Neither of the male prostitutes ever paid the clerk nor the defendants for permission to use the booth for prostitution. The Commonwealth also called George Troianos, a former clerk at the bookstores. Over objection, he testified that at one time he overheard males discussing having enough money for dinner after spending some time in a movie booth. Over objection he also testified that he heard "Edna May" complain that he had paid ten dollars for sex and her partner turned out to be gay. The Commonwealth also called as witnesses a number of female dancers. Each testified that the defendants' never asked them to have sex with anyone. they stated

that no solicitation was permitted at the bookstores and that they, on occasion, would solicit some customers at the bachelor parties, they did so out of the defendants' presence. They did say that they would play with the bachelor party customers by sitting on their laps and putting their arms about them. The Commonwealth and defendants also called patrons of the bachelor parties. No patron testified that he arranged with the defendants for sex. The patrons called by the Commonwealth testified that they did not have sex with any of the girls. In fact, the only individual who testified that Senior offered him sex was Trooper Marsinetti. He testified that Senior offered him intercourse or fellatio for money. However, he told Trooper Funk that Senior only said that the girls would "take care" of all of the men for $200.00 and that neither he nor any of the other troopers were successful in soliciting the girls or Mr. Birdseye Senior. Sam Anthony, a customer who arranged a bachelor party with Mr. Birdseye Senior through Gina Rizzo, the government informant (Source Two), stated that he arranged to have sex with Katie and/or Haley by himself and in no way arranged for sex with Mr. Birdseye Senior. This was the "extensive and widespread" organized prostitution enterprise to which the courts below referred in justifying some imagined harm to property.

In order to prove obscenity the Commonwealth offered only

one magazine and one video tape. The defendants offered Dr. Chauncey Rawleigh, a minister and a professor at Indiana University of Pennsylvania, who testified that he had studied sexual practices and behavior in Pennsylvania and elsewhere and that through formal and informal study he could state that the state wide population would not find that the subject matter depicted sexual conduct in a patently offensive manner. Again the purchase of one magazine and one video tape demonstrate the tiny nature of this enterprise which could in no way harm the property of anyone any more than any retail store. There were no allegations of evading taxes or of any economic loss to anyone. The petitioners sought to illustrate the harmlessness of these materials by offering into evidence examples of explicit materials shown, advertised or offered for lease of sale in everyday stores, cinema theaters, video tape rental and sales outlets, newsstands, mail order and cable and satellite television. None of the offered material was obtained in an "adult bookstore" or other adult establishment. The trial court limited the defendants to several publications and but one hour's run of video tape. The defendants offered to show the films in their entirety and to offer about six hours of video and audio tapes obtained from such sources of films which made the Commonwealth's movies purchased at the petitioners' stores look absolutely tame in terms of explicit sex, violence or "perversions."

The Commonwealth offered evidence that the police had intercepted conversations in which the defendants were overheard discussing the installation of a recorder to monitor their stores' telephones in order to find out who was committing criminal acts at the stores. The defendants proved that all employees were forewarned that their conversations would be monitored by management through a store manual.

After the defendants had rested but before the case went to the jury, the defendants' attorney received a letter from Robert Hapchuck, a prisoner at the State Correctional Institute in Mercer, Pennsylvania. It contained much evidence that Trooper Gentile, the Commonwealth's case agent and leading witness who conducted the investigation and wire interception in this matter had attempted to plant or entrap the defendants with child pornography through the use of Mr. Hapchuck as an inside employee. Feeling that such testimony could be vital to the defendants' case as it demonstrated a clear bias and ruthless prejudice on the part of the primary prosecution witness, the defense asked to reopen its case and to obtain the person of Mr. Robert Hapchuck from prison to testify. The motions were denied and Mr. Hapchuck was not permitted to testify.

During its charge to the jury the trial court stated:

> To a certain extent you will in your deliberations, I presume, compare the various materials, but

> ultimately, ladies and gentlemen, it is for you to determine what the community standards were at the time. You may conclude, after you reviewed this evidence, that none of it was obscene, applying the rules that I just gave you, or you can conclude that all of it is obscene.

The defendants objected to the instruction as no decision as to the obscenity of the defendants' exhibits was called for.

The defendants were convicted of all charges and sentenced outside the guidelines to prison terms of three (Junior) and five (Senior) years. The defendants objected to the excessive sentences as no aggravating circumstances were demonstrated.

From the judgment and sentence of the Court of Common Pleas the defendants took appeals and from the Superior Court's affirmance of those judgments petition this Honorable Court for allowance of appeal. The Pennsylvania Supreme Court granted allowance of appeal as to the single issue of the propriety of the wire interception under the federal wire communications statute, Title 18, United States Code, §2516(2). On 18 January 1996 the Supreme Court of Pennsylvania affirmed the courts below and based its decision upon a legislative finding that prostitution and obscenity were harmful to the economy of the Commonwealth of Pennsylvania due to a finding that these offenses involved organized crime in an extensive enterprise.

ARGUMENT I

THE INTERCEPTION OF THE DEFENDANTS' WIRE COMMUNICATIONS VIOLATED TITLE 18, UNITED STATES CODE, §2516(2)

As a result of the holdings of the Supreme Court of the United States in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed,2d 576 (1967); *Osburn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 429 (1966); *Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1966), Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act which is codified in Title 18, United States Code, §2510 et seq. In order to limit electronic surveillance to cases of some significance, the nature of the crimes to be investigated by wiretapping was limited by Title 18, United States Code, §2516. State applications for interceptions of wire communications were limited by §2516(2) which provides:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney for any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception

> may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs or other crime dangerous to life, limb or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

As prostitution, obscenity, corrupt organizations, wiretapping and possession of wiretapping equipment are not among the enumerated crimes for which a state may intercept wire communications, it must be determined whether or not they fall under the general provision "...other crime dangerous to life, limb or property..." In order to determine what Congress meant by those terms one must look at the legislative history of the act. See Senate Report No. 1097, 90th Congress, 2nd Session, *United States Code, Congressional and Administrative News* (1968) p. 2234 in which it is made clear that only "intrinsically serious" crimes or those associated with organized crime among those for the investigation of which Congress permitted the interception of wire communications. In fact it was made clear that the investigation of sexual crimes such as "fornication and adultery" were excluded from State wire interception. Since fornication and adultery involve exactly the same dangers to life, limb or property as prostitution (the only added element to make fornication or adultery prostitution is the remuneration required by the

prostitute, the crime of prostitution by logical extension of this legislative history is also beyond the scope of §2516(2). See *People v. Shapiro*, 50 N.Y.2d 897, 906-908 (Court of Appeals, 1980); *United States v. Millstone Enterprises*, 684 F. Supp. 867, 870-875 (WPDA, 1988), reversed on other grounds, 684 F.2d 21 (3rd Cir. 1989), a case involving the same wire interception and same applications as the case at bar. Although the trial court and Superior Court made much of the AIDS disease in stating that prostitution is dangerous to life and limb, other fatal venereal diseases such as syphilis were well known to Congress when it chose to exclude sexual crimes such as fornication from §2516(2) coverage and to the Pennsylvania Legislature when it required a showing of danger to life, limb or property for inclusion of prostitution within its wire tap statute. See Title 18, Pennsylvania Consolidated Statutes, §5708(2) which permits applications for wire interceptions for certain offenses under Title 18 as follows:

> (2) Under this title, where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year:
>
> * * * *
>
> Section 5902 (relating to prostitution and related offenses...

Clearly then, States cannot legislate broader authority to intercept wire communications in criminal investigations than the authority granted

to them by §2516(2). In keeping with that grant of limited authority Pennsylvania enacted its wiretap statute to conform with Federal requirements. Additionally, in order to fulfill its intended purpose, this provision must be strictly construed as it involves serious intrusions into the privacy of citizens. See *United States v. Vest*, 813 F.2d 477, 483-484 (1st Cir. 1987). Here, the trial court and Superior Court attempt to assert that the dangers of sexually transmitted disease "focused" upon by the Commonwealth and the trial court but neither sworn to as a part of the affidavit accompanying the wire interception application nor demonstrated by proof at the suppression hearing, has been present throughout history. Venereal disease was prevalent in 1968-1969 when the Omnibus Crime Control and Safe Streets Act was being considered as it was in 1978 when the Pennsylvania Wiretapping and Electronic Surveillance Control Act was enacted and is today. Clearly, that was not the type of danger to life or limb that Congress intended to protect by investigatory interceptions of citizens' communications. The "crime" in the offense of prostitution is charging money for sex, not having sex which is not a crime. The "danger to life and limb" relied upon by the Commonwealth and trial court (by judicial notice -- a rather new element added to the "four corners" requirement that all facts amounting to probable cause must be contained in the affidavit), although never made a part of the

probable cause affidavit nor the subject of proof before the court, is equally present in criminal as non-criminal sex which was specifically eliminated by the legislative history of the federal act.

Additionally, the Pennsylvania wiretapping statute provides that several offenses may be investigated by interceptions of wire communications "...where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year." One of those crimes is prostitution. Thus, in cases where prostitution is demonstrated to be dangerous to life, limb or property it may be investigated by interception of wire communications. See Title 18, Pennsylvania Consolidated Statutes, §5708(2). In the Commonwealth of Pennsylvania it has long been established that probable cause must be established by a written affidavit. See Rule 2003, Pennsylvania Rules of Criminal Procedure which provides:

> (a) No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority. The issuing authority, in determining whether probable cause has been established, *may not consider any evidence outside the affidavits*.
>
> (b) At any hearing on a motion for the return or suppression of evidence, or for suppression of the fruits of evidence, obtained pursuant to a search warrant, *no evidence shall be admissible to establish probable cause other than the affidavits provided for in paragraph (a)*.

In the case at bar there is no mention of danger to anyone or anything

in the affidavits. Dangers to life, limb or property make up no part of the affidavit; thus, the allegations of prostitution do not meet the standards set forth in Title 18, Pennsylvania Consolidated Statutes, §5708(2) and the trial court's "judicial notice" of the hazards of AIDS being greater in instances of prostitution than in other consensual sexual behavior are without evidence in the affidavits or in court. Prostitution where no danger to life, limb or property is set forth is not subject to investigation through interceptions of wire communications by either the Pennsylvania statute or the federal standard.

It would appear that attempts to justify the wire interception on the basis of corrupt organizations should fail for similar reasons. First, an attempt to call obscenity a danger to life, limb or property is merely absurd. Second, prostitution, if more than one instance is demonstrated may qualify as a corrupt organization, but must have proved the additional element of danger to life, limb or property to be investigated through the interception of a suspect's wire communications as we have pointed out above.

Third, if the Pennsylvania statute is read to include all prostitution or all obscenity to be investigable by means of wire interceptions, then the Pennsylvania Statute is an unauthorized attempt to broaden the scope of Title 18, United States Code, §2516(2) and

would be unconstitutional due to the supremacy clause of the Constitution of the United States. Clearly, the Procrustean stretching of the Pennsylvania and Federal statutes in which the Pennsylvania Courts indulged *dehors* any evidentiary justification in either the affidavit or at any hearing fails to satisfy either the standards required by the Commonwealth or the United States. To extend the trial court's logic, the sale of two *Playboy"* magazines could justify the interception of wire communications because Pennsylvania included obscenity within its corrupt organizations statute. Furthermore, the Pennsylvania Wiretapping and Electronic Surveillance Control Act does not include violations of Title 18, Pennsylvania Consolidated Statutes, §911, engaging in a pattern of racketeering activity, as one of the crimes for which electronic surveillance can be authorized. See Title 18, Pennsylvania Consolidated Statutes, § 5708. The Commonwealth relies on Title 18, Pennsylvania Consolidated Statutes, § 5708(5) which reads:

> Any offense set forth under the act of November 15, 1972 (P.L. 1227, No. 272.[6]

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[6] Section 3923 of this title (sic.).

Actually the statute referred to as P.L. 1227, 272 is not Title 18, Pennsylvania Consolidated Statutes, §3923 as no such section exists. It was § § 3923 of the former and repealed Pennsylvania Corrupt

Organizations Act at Title 18, Purdons Pennsylvania Statutes, § 3923. That section, prior to its repeal, long before this investigation, was significantly different than Title 18, Pennsylvania Consolidated Statutes, § 911. For example, the former statute includes no reference to obscenity as a covered racketeering activity where the present statute includes all obscenity provisions, including selling or display of a *Playboy* magazine as a racketeering activity. Compare Title 18, Purdons Pennsylvania Statutes, § 3923(1) with Title 18, Pennsylvania Consolidated Statutes, § 911(h)(1)(i). Obviously, these insignificant offenses are not those anticipated by Congress as crimes "dangerous to life, limb or property..." See Senate Report No. 1097, supra, at p. 2234. The old act was repealed and Title 18, Pennsylvania Consolidated Statutes, § 911 has never been substituted within the provisions of the Pennsylvania Wiretapping and Electronic Surveillance Control Act as one of the offenses for which the electronic interception of wire or oral communications could be authorized. Of course, to do so would have violated the provisions of Title 18, United States Code, § 2516(2) as has already been discussed.

CONCLUSION

For the above stated reasons, it is respectfully submitted that the appellants' convictions should be reversed and the Commonwealth prohibited from using the wire interception in question nor any evidence derived therefrom in the future.

Respectfully submitted,

Thomas A. Crawford, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the within brief has been served upon:

District Attorney
Allegheny County Courthouse
Pittsburgh, PA 15219

by hand delivery on 18 April 1996.

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